No. 87-5666/87-6026

87-5765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSE MARTINEZ HIGH,

Petitioner,

v.

WALTER ZANT, WARDEN,

Respondent.

HEATH A. WILKINS,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

On Writs of Certiorari to the United States Court of Appeals
for the Eleventh Circuit and the Supreme Court of the State of Missouri

BRIEF OF THE CHILD WELFARE LEAGUE OF AMERICA, NATIONAL PARENTS AND TEACHERS ASSOCIATION, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, CHILDREN'S DEFENSE FUND, NATIONAL ASSOCIATION OF SOCIAL WORKERS, NATIONAL BLACK CHILD DEVELOPMENT INSTITUTE, NATIONAL NETWORK OF RUNAWAY AND YOUTH SERVICES, NATIONAL YOUTH ADVOCATE PROGRAM, AND AMERICAN YOUTH WORK CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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OTHER AUTHORITIES

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National Commission on the Reform of

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National Council of Juvenile and Family Court Judges, Resolution of July 14, 1988..... 37

Streib, The Eighth Amendment and Capital Punishment of Juveniles, 34 Cleve. St. L. Rev. 363 (1987)..... 38,60

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United Nations, Economic and Social Council, Report of the Secretary General, Capital Punishment (1973).... 40

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INTERESTS OF AMICI CURIAE[1]

The Amici who have joined in submitting this brief are linked by their special concern for children and their extensive experience in working with troubled youth. It is the hope of Amici that their insights into the unique nature of childhood and the attributes of children will be of assistance to the Court in resolving the difficult issues raised in these cases.

The Child Welfare League of America is an association of approximately 450 leading child welfare agencies in the United States and Canada and 1,200 affiliates in twenty-seven state associations, devoted to improving services for deprived, neglected, and abused children. The Child Welfare League

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1/ This brief is being filed with the consent of all parties. Copies of the consent letters are on file with the Clerk of the Court.

includes in its membership both public and voluntary, as well as both religious and non-sectarian agencies.

The National Parents and Teachers Association (PTA) is the nation's largest child advocacy organization, comprising 6.4 million members in 50 state congresses and 26,000 local units nationwide and in Europe. A 501(c)(3) non-profit corporation, PTA is devoted to the education, health, protection, and welfare of children and youth. The national PTA pursues child-related federal legislation, prepares educational materials, and promotes parental involvement in the lives of children.

The National Council on Crime and Delinquency is a non-profit corporation that conducts research, recommends national juvenile justice standards, and works with correctional and juvenile court professionals and citizens' groups to improve the quality of the criminal and juvenile justice systems.

The Children's Defense Fund (CDF) is a national public charity that represents and advocates on behalf of low-income, minority and handicapped children. CDF strives for preventive intervention before youth drop out of school, suffer family break-down or get into trouble. CDF also addresses the special needs of troubled youth in the child welfare, juvenile justice, and mental health systems.

The National Association of Social Workers (NASW), a non-profit professional association with over 115,000 members, is the largest association of social workers in the United States. NASW is devoted to promoting the quality and effectiveness of social work practice and to improving the

quality of life through utilization of social work knowledge and skills.

The National Black Child Development Institute (NBCDI) is a non-profit organization dedicated to improving the quality of life for Black children and youth. NBCDI's network of affiliates provides services such as finding adoptive homes for Black children and providing tutoring and leadership training for youth, and its volunteers help educate their communities about national, state, and local issues facing Black youth.

The National Network of Runaway and Youth Services, Inc. is a membership organization of approximately 1000 community-based youth-serving agencies, which serves as a communication, information and public education exchange on issues affecting youth, advocates on behalf of vulnerable youth and their families, and

conducts research and demonstration projects.

The National Youth Advocate Program, Inc., is a private non-profit youth advocacy and direct-service organization, which is responsible for developing and providing a range of individualized, flexible and innovative community-based programs for very troubled and needy youth as an alternative to institutionalization, and which has had considerable success in working with older adolescents with very serious needs and behavior problems.

The American Youth Work Center, a Washington-based organization that promotes improvement of services to children at risk, holds national and international training conferences and prepares reports on issues relating to youth services.

SUMMARY OF ARGUMENT

Amici's lengthy experience in counseling and rehabilitating troubled youth compels the conclusion that no person should ever be executed for an offense committed while under the age of eighteen years.

In Part I of this brief, amici demonstrate the unavoidability of the conclusion that the Eighth Amendment establishes safeguards against the execution of children who were under eighteen at the time of the offense. Amici draw on their knowledge of adolescents to show that the same factors that render capital punishment unconstitutional for very young children render it equally improper for all children below the age of eighteen. In particular, amici call on their knowledge of youthful offenders to show that even extremely violent youth are capable of rehabilitation

when provided with appropriate services. It would not only be senseless, but fundamentally inhumane, to extinguish the lives of young people who could grow into productive and responsible members of society.

Part II demonstrates that even assuming arguendo that viable distinctions could be drawn between sub-classes of children for purposes of capital punishment, the statutory schemes of Georgia and Missouri fail to serve that classification function in a constitutionally acceptable manner.

ARGUMENT

I.

The Eighth Amendment Self-Evidently Prohibits the Execution of Children, and There Is No Constitutionally Acceptable Basis For Drawing The Line Of Adulthood At Any Point Other Than Age Eighteen

A. Examination of the Reasons Why Execution of Very Young Children is Self-Evidently Unconstitutional Reveals the Factors that this Court Should Consider in Determining the Minimum Age for Eligibility for Capital Punishment

Last Term, all the members of this Court "agree[d] on [the] . . . fundamental proposition . . . that there is some age below which a juvenile's crimes can never be constitutionally punished by death." Thompson v. Oklahoma, 108 S. Ct. 2687, 2706 (1988) (O'Connor, J., concurring). See id. at 2695 (plurality opinion); id. at 2718 (Scalia, J., dissenting).

The hypothetical employed by the plurality in Thompson in describing this proposition as "self-evident" -- the execution of a ten-year-old (see id. at 2695 & n.27) -- is worth considering in order to extract the factors that render it compelling. As this hypothetical makes apparent, the execution of a child does not contribute measurably to either of the "two principal social purposes" of capital punishment: "deterrence of capital crimes by prospective

offenders" and "retribution." Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion).

This Court concluded in Gregg, supra, that "the death penalty undoubtedly is a significant deterrent" for many criminals. 428 U.S. at 185-86. In speaking of the quintessential type of murderer who might be deterred by capital punishment -- the "murder[er] for hire" who engages in a "cold calculus . . . preced[ing] the decision to act," id. at 186, the Court presumably was envisioning a sophisticated adult. With respect to adult murderers, it seems quite clear that the expansion of the range of the death-eligible population to include ten-year-olds would not contribute even marginally to the goal of deterring adults from committing capital crimes. Adults are not likely to view the execution of a ten-year-

old as having any relevance to them.

Thus, the only population that could even conceivably be affected by the inclusion of ten-year-olds in the death-eligible population would be children in the same general age range. But, in fact, the execution of a ten-year-old would not deter other young children from homicide, for such children do not have the ability to make rational judgments about their behavior. Ruled by their feelings, extraordinarily dependent upon their parents for protection and guidance and survival, and emotionally bound to their families, young children's "judgments" are the products of family dynamics and emotion, rather than the considered assessment of alternative courses of behavior. Thus, a ten-year-old might kill someone (or at least attempt it) if the homicide seemed necessary to the aid and

comfort of his family or if it seemed that the family would condone or approve it. The threat of death would no more deter such a child than it would "those [adults] who act in passion for whom the threat of death has little or no deterrent effect." Gregg v. Georgia, supra, 428 U.S. at 185.

Similarly, the execution of a ten-year-old would not satisfy society's need for retribution. Ten-year-olds do not yet have the capacity to function as moral beings, able to evaluate their behavior in light of socially accepted values. They simply do not yet know the appropriateness of behavior within the society in which they live. Instead, ten-year-olds are profoundly dependent upon their parents and their family to define for them the boundaries of the appropriate. Ten-year-olds have no independent ability to evaluate the appro-

priateness of their own behavior and thus cannot be held personally responsible for that behavior, even if it transgresses the criminal law. For that reason, condemnation of ten-year-olds makes no contribution to society's need for retribution.

As this Court has stated, "retribution as a justification for [the death penalty] . . . very much depends upon the degree of [the defendant's] culpability." Enmund v. Florida, 458 U.S. 782, 800 (1982). The "critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime." Tison v. Arizona, 107 S. Ct. 1676, 1687 (1987). The ultimate sanction of death is reserved for those who engage in acts of "intentional wrongdoing" (Enmund, supra, at 800) and "purposeful . . . criminal conduct" (Tison,

supra, at 1687): those individuals who intentionally kill or who "knowingly engag[e] in criminal activities known to carry a grave risk of death." Id. at 1688. But ten-year-olds lack the ability to understand the moral implications of their behavior, and thus cannot form the "highly culpable mental state[s]" (id.) that warrant the retributive imposition of the death penalty.

Finally, the execution of a ten-year-old is not warranted by the penological justification of incapacitation. The need for incapacitation arises only if the likelihood that an offender will kill again is so great that imprisonment will not suffice to protect other people. See generally Gregg v. Georgia, 428 U.S. at 183 n.28. It is unthinkable that such a need could exist with respect to a ten-year-old. Such a child is hardly more than a hint of what he

or she will become as an adult. The potential to grow into a morally responsible, productive adult is unlimited in such a child. With positive support and education, a ten-year-old child can as fully leave behind the emotions and behaviors that led that child to kill as the butterfly leaves behind the cocoon. There simply cannot be a legitimate need to incapacitate a ten-year-old child with the finality of death. As observed by the Supreme Court of Kentucky with respect to a child older than ten:

> [I]ncorrigibility is inconsistent with youth; . . . it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life.

Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968).

B. The Attributes of Childhood that Render Ten-Year-Olds Exempt from Execution Are Generally Shared by the Class of Minors Below the Age of Eighteen

In resolving the difficult question of where the Eighth Amendment draws the line between the class of clearly exempt young children and those individuals eligible for capital punishment, the foregoing analysis of the characteristics of a ten-year-old provides guidance. The line must be drawn in such a way as to reliably guard against execution of children whose impulsivity and lack of judgment render inapplicable the goals of deterrence and retribution, and whose capacity for growth renders inapplicable the goal of permanent incapacitation.

1. The Prevalence of Impulsivity and Poor Judgment Among Adolescents Below the Age of Eighteen Renders Inapplicable the Goals of Deterrence and Retribution

As the Thompson plurality noted, social scientific literature overwhelmingly supports the conclusion that adolescence is a period characterized by impulsivity and poor

judgment. Thompson, supra, 108 S. Ct. at 2699 n.43 (plurality opinion). The experience of Amici in working with adolescents amply supports these observations about the period of adolescence. The stage of developmental growth known as adolescence frequently is characterized by: impulsivity and inability to exercise self-restraint; inability to consider the future consequences of one's actions; the false confidence generated by feelings of omnipotence; inadequate judgment, in part because of the lack of sufficient life experience to provide a perspective or broader context for evaluating events; and susceptibility to the influence of peers, partly because of the lack of sufficient confidence in one's own identity.

This Court has repeatedly recognized these aspects of adolescence. For example, in Eddings v. Oklahoma, 455 U.S. 104 (1982),

the Court observed that minority "is a time and condition of life when a person may be most susceptible to influence and to psychological damage" and that adolescents "generally are less mature and responsible than adults." Id. at 115-16. Similarly, in Haley v. Ohio, 332 U.S. 596, 599 (1948), this Court referred to the "period of great instability which the crisis of adolescence produces."

The typical attributes of adolescence have an obvious bearing on the assessment of whether executions of juveniles could possibly serve the penological goals of capital punishment. Because many adolescents act impulsively without a "cold calculus . . . preced[ing] the decision to act," Gregg v. Georgia, supra, 428 U.S. at 186, they are no more subject to deterrence than are their ten-year-old counterparts. The

retribution rationale is equally inapplicable: adolescents "'deserve less punishment because [they] may have less capacity to control their conduct and to think in long-range terms than adults.'" Eddings v. Oklahoma, supra, 455 U.S. at 116 n.11 (quoting Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders). The retribution rationale also is less applicable to juveniles because "'youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.'" Id.

2. Adolescents' Vast Capacity for Growth and Rehabilitation Renders Unjustifiable the Use of the Ultimate and Irrevocable Penalty of Death

As this Court recognized in Jurek v.

Texas, 428 U.S. 262 (1976), and again in Skipper v. South Carolina, 476 U.S. 1 (1986), the determination of the suitability of the use of the ultimate penalty of death inevitably involves a "'predict[ion] . . . [of the] convicted person's probable future conduct.'" Skipper, supra, 476 U.S. at 5; Jurek, supra, 428 U.S. at 275. Accordingly, just as Jurek approved the use of evidence that "a defendant would in the future pose a danger to the community if he were not executed . . . as . . . an 'aggravating factor'. . .[,] [Skipper held that] evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating." Skipper, supra, 476 U.S. at 5. See also Franklin v. Lynaugh, 108 S. Ct. 2320, 2329 (1988) (describing Skipper as holding that the "defendant's likely future behavior" is a

relevant consideration in a capital sentencing determination).

While adults may have widely varying degrees of potential for rehabilitation, the class of adolescents shares a common trait of vast potential for rehabilitation. As the Thompson plurality observed, adolescence is a period marked by "capacity for growth." 108 S. Ct. at 2699. It has been the experience of amici, in working with adolescents, that they have boundless capability for change, since the personality that the individual will have as an adult is still in the process of being formed. And, precisely because adolescents are so malleable and may develop very different personalities and values as they gain experience and perspective, it is impossible to conclude definitively that a particular youth must be executed in order to incapacitate him or her

from committing future crimes. Indeed, as the following discussion will show, the social scientific literature and the experience of amici demonstrate that many violent adolescents can be rehabilitated.

Social scientific literature is replete with evidence that even the most violent adolescents are capable of dramatic change and rehabilitation. A two-year follow-up study of homicide offenders paroled from the California Youth Authority (CYA) in 1984 showed that 76.7 % of these offenders successfully completed their period of parole, while CYA parolees who had been convicted of non-homicide offenses had a parole success rate of only 41.9 %. California Youth Authority, Offender-Based Institutional Tracking System (1987). A study of chronic and violent juvenile offenders in Ohio similarly found that

approximately 60 % of youths who were charged with murder in juvenile court were not subsequently re-arrested as adults. D. Hamparian, R. Schuster, S. Dinitz & J. Conrad, The Violent Few (1977).

The experience of Amici in working with young people confirms these social science findings on the malleability and inherent rehabilitative potential of violent youth. The populations served by amici range from extremely young, neglected children to violent delinquents on the verge of adulthood. Amici have repeatedly found that these children can be taught to adopt society's norms, precisely because juvenile crimes grow out of the "[a]dolescent[']s ... vulnerab[ility], ... impulsivi[ty], and ... [lack of] self-discipline[]." Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth

Crime 7 (1978) (quoted in Eddings v. Oklahoma, supra, 455 U.S. at 115 n.11).

An examination of a few actual case histories provides the clearest possible illustration of the rehabilitative potential that even extremely violent youth possess:

> (i) A girl whom we will call Dora (real name withheld to preserve confidentiality), grew up in Washington D.C., raised by parents who were drug sellers and addicts. Starting when Dora was eight years old, her parents used her as a courier in their drug trade. When Dora was fourteen-years-old, she killed her boyfriend, by shooting him in the back. When Dora was seventeen, she committed an armed robbery, in which she pistol-whipped the victim. At the age of eighteen, Dora committed another homicide, again of a boyfriend. Dora was removed from her community, and sent to a residential facility in California. She graduated successfully from the program and has remained crime-free for the past seven years. Today she is twenty-seven years old, still living in California, living with a man who is gainfully employed as the manager of a small store, and raising two children.
>
> (ii) Kevin, a sixteen-year-old who resided in the Roxbury section of Boston, committed a series of robberies while armed with a knife. During one of these

armed robberies in 1974, he gratuitously stabbed a senior citizen. Kevin was convicted in juvenile court of armed robbery and assault and battery by means of a dangerous weapon, and then, pursuant to the procedure that prevailed in Massachusetts at the time, the Commonwealth attempted to transfer him to adult court for re-prosecution as an adult. The transfer was prevented by this Court's intervening decision in Breed v. Jones, 421 U.S. 519 (1975). Kevin was sent to a community-based non-residential treatment program for juveniles. The program provided intensive special educational services appropriate for his mild mental retardation, and provided counseling to deal with his low self-esteem, inadequate home life, and negative peer group. Kevin successfully graduated from the program after one year. Since that time, he has remained crime-free.

(iii) Michael, a fifteen-year-old boy who lived in Washington, D.C., killed his step-mother with an axe, dismembered her body and put it in the dust-bin. He was convicted in juvenile court in 1964, and sentenced to the juvenile detention facility for an indeterminate period. He remained in the facility for 4 years and was released when he was nineteen years old. While he had been incarcerated in the facility, he received a variety of rehabilitative services and, most significantly, established a relationship of trust with a recreation counselor, with whom he maintained contact even after leaving the facility. Upon returning to the community, Michael finished school and

then obtained employment in an air-conditioning installation company. He subsequently married, settled in a working class apartment project, and raised a child. As of his last contact with the recreation counselor, which occurred in 1980, he had remained crime-free and was still employed and happily married.

(iv) Edward Harrison (real name being used with consent) was seventeen years old when he committed a felony murder, shooting the victim with a sawed-off shotgun during the commission of a robbery. The crime took place in Washington D.C. in March of 1960. Eddie was charged as an adult with first-degree murder, convicted, and sentenced to death. While Eddie was on death row awaiting execution, having waived his right to appeal, it was discovered that his trial attorney had been practicing law without a license. Accordingly, Eddie's conviction was reversed and he was re-tried. He was once again convicted, but because the death penalty was no longer in effect, Eddie was sentenced to life imprisonment. The conviction was again overturned on appeal, Eddie was again re-tried and again sentenced to life imprisonment. However, during the eight-and-a-half years that Eddie had spent in prison pending appeals and re-trials, he had become involved in arranging rehabilitative programs for himself and other inmates. Through the support of prison staff and a local judge, Eddie was released pending appeal and became involved in designing rehabilitative programs for delinquent youth. His conviction was eventually upheld on

appeal, but, as a result of the progress he had achieved, his sentence was commuted by President Nixon. Since Mr. Harrison's release from prison in 1968, he has devoted his life to programs for youth. Now 45 years old, he is the executive director of a Baltimore-based program for pre-trial diversion for delinquent youth, which Mr. Harrison himself created and initiated with the aid of a federal grant, and which now is an established Maryland state program. Mr. Harrison also is the vice-chairman of the Maryland Juvenile Justice Advisory Council, and has testified before Congress on issues relating to youth and delinquency.

The same remarkable transformation that occurred in each of these cases has been replicated in numerous other cases of equally serious crimes as well as less serious crimes. The successes are usually due to the quality and creativity of the rehabilitative facility. For example, the House of Umoja in Philadelphia has experienced remarkable successes in reforming members of violent youth gangs, for more than a decade. See R. Woodson, A Summons to Life: Mediating Structures and the Prevention of Youth Crime (1981); Fattah, "Call and Catalytic Response: The House of Umoja," in Violent Juvenile Offenders: An Anthology 231 (1984). The Glen Mills School in Concordville, Pennsylvania, has also had remarkable successes in reforming extremely violent delinquents, through a combination of excellent academic and vocational training and athletic programs, as well as a variety of creative measures designed to build self-esteem. For example:

Richard, a fifteen-year-old who was convicted of first-degree felony-murder in the West Virginia juvenile court, was placed in the Glen Mills School in March of 1984. During the period of almost three years that Richard remained at Glen Mills, he received special education classes and vocational training in a variety of marketable skills, and he participated in student government and varsity sports. During his final seven months at the school, Richard was placed in a day-time job in a local furniture store, where he could apply the wood-working skills he had learned at the school. Richard was released in January of 1987 and is now living with his sister in Ohio and complying with all of the

> conditions of his probation. He is presently looking for employment in the furniture construction trade, and, in the interim, is working in a restaurant.

Developments in corrections policies in recent years provide the promise of continued and increased success in the reformation of violent youth. In January of 1980, the Federal Office of Juvenile Justice and Delinquency Intervention initiated a nationwide research and development effort to identify the most effective intervention strategies for rehabilitating violent juvenile offenders. See Fagan, Rudman & Hartstone, "Intervening with Violent Juvenile Offenders: A Community Reintegration Model," in Violent Juvenile Offenders: An Anthology, supra at 207-09. The preliminary results of this national research effort indicate that recidivism can be significantly reduced through a regimen of short-term confinement in a small secure facility

with intensive staff support, followed by the provision of carefully planned services upon the youth's re-entry into the community. See Krisberg, "Preventing and Controlling Violent Youth Crime: The State of the Art," in I. Schwartz, Violent Youth Crime: What Do We Know About It and What Can Be Done About It (1987). See also P. Greenwood & F. Zimring, One More Chance: The Pursuit of Promising Intervention Strategies for Chronic Juvenile Offenders (1985).

The available empirical evidence thus refutes popular assumptions about the "street-wise" or "hardened" nature of juvenile criminals. It suggests instead that adolescents, regardless of whether they committed very violent offenses or less serious crimes, are capable of rehabilitation. Thus, with respect to a crucial element of capital sentencing -- the

likelihood of commission of future crimes -- juveniles as a class are distinguishable from adults. Given the irrevocable nature of capital punishment which calls for a requirement of heightened reliability in capital sentencing, see, e.g., Lockett v. Ohio, 438 U.S. 586, 604-05 (1978), the Eighth Amendment cannot tolerate the risk of executing young persons who, with time, stand a great chance of maturing into productive members of society.

C. There Is No Constitutionally Acceptable Basis For Drawing The Line Of Adulthood At Any Point Other Than Age Eighteen

Certainly it cannot be said that every person under the age of eighteen necessarily shares in precisely the same degree the qualities which typify the period of adolescence. Individual adolescents vary markedly in their degree of maturity, self-control, and judgment. The attainment of adult

levels of maturity and judgment may occur at different ages, depending upon the individual youth's prior experiences, education, and support network of parents and friends.

The question that must be resolved, then, is whether there is a principled basis for distinguishing among the class of adolescents in administering the death penalty.[2] As the discussion in preceding

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2/ In essence, there are three distinct issues of criminal responsibility that may arise when a child is prosecuted for a crime. The first of these is whether the child is criminally responsible at all. As Justice Scalia noted in his dissenting opinion in Thompson, the common law absolved children under the age of seven from any criminal responsibility whatsoever. 108 S. Ct. at 2714. It is evident that the common law's concept of the minimal degree of maturity necessary to be prosecuted at all is a very different consideration from the question of the degree of maturity necessary to justify the ultimate punishment of death. The second question that must be asked regarding prosecution of a child is

sections has demonstrated, children under the age of eighteen, as a class, share certain qualities that render the use of capital punishment unjustifiable. In the present section, amici will show that given the commonality of qualities such as impulsivity and poor judgment among adolescents, the only principled distinction between children and adults in the context of capital punishment is the age of majority. This conclusion is supported by the

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whether that child, once subjected to criminal liability, should be prosecuted as an adult. The third and discrete question is whether that child, having been found mature enough to be transferred to adult court for prosecution as an adult, should be exposed to the ultimate punishment of death. A positive answer to that final question necessarily requires a greater level of culpability and thus maturity than that needed to render a child criminally responsible or even subject to transfer to adult court.

"objective manifestations" of society's views -- legislative pronouncements and jury verdicts -- and also by this Court's analysis of children's rights in prior caselaw.

1. The objective manifestations of modern values militate for drawing the line at age eighteen

There are only six States that have consciously and clearly chosen to sanction the use of the death penalty for defendants who were under the age of eighteen at the time of the offense. See Thompson, supra, 108 S. Ct. at 2696 n.30. Fifteen States and the District of Columbia prohibit capital punishment of adults and juveniles alike. Twelve States, although tolerating capital punishment for adults, have consciously chosen to set the minimum age of eligibility for capital punishment at eighteen. See id. Although twenty-three more jurisdictions

fail to specify a minimum age limit for capital punishment, it can hardly be said that these jurisdictions have consciously and clearly sanctioned executions of children under the age of eighteen since, as Justice O'Connor explained in her concurrence in Thompson, there is no evidence that these States "realize[d] that [their] . . . actions would have the effect of rendering [children below the age of eighteen] . . . death-eligible or . . . [gave] the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death-eligibility." 108 S. Ct. at 2711.

Even more significant to the assessment of the evolution of national standards of decency is the fact that recent state legislative proceedings demonstrate a clear trend of increasing recognition of the

unconscionability of executing children. Nebraska and Ohio established prohibitions against the execution of children under the age of eighteen in 1982. See Neb. Rev. Stat. § 28-105.01 (1985); Ohio Rev. Code Ann. § 2929.02(A) (1984). Colorado and Oregon followed suit in 1985, and New Jersey in 1986. See Colo. Rev. Stat. § 16-11-103(1)(a) (1986); Ore. Rev. Stat. §§ 161.620 & 419.476(1) (1987); N.J. Stat. Ann. §§ 2A:4A-22(a) (1987) & 2C:11-3g (Supp. 1988). In 1987, the Maryland legislature joined the growing trend by also adopting age eighteen as the minimum age for capital punishment. See Md. Code art. 27, § 412(f) (1988). Thus, it seems clear that the half-dozen States that have consciously sanctioned execution of children below the age of eighteen constitute a dwindling minority.

Model legislation and criminal justice

standards also reflect a contemporary judgment to ban executions of children below the age of eighteen. The Model Penal Code, which the Court considered in gauging the constitutionality of capital punishment in Gregg v. Georgia, supra, 428 U.S. at 191, 193, recommends that children below the age of eighteen be deemed ineligible for capital punishment. See American Law Institute, Model Penal Code § 210.6 (Official Draft 1980). The National Commission on the Reform of Criminal Law similarly called for a prohibition against execution of children below the age of eighteen. National Commission on the Reform of Criminal Law, Final Report of the New Federal Code § 3603 (1971). The American Bar Association, which has never before taken a formal position on any aspect of capital punishment, adopted a resolution in 1983 opposing "the imposition

of capital punishment upon any person for any offense committed while under the age of eighteen." American Bar Association Report No. 117A (approved in August, 1983). The National Council of Juvenile and Family Court Judges similarly adopted a resolution on July 14, 1988, declaring that the Council "is opposed to capital punishment of those who committed an offense while under the age of eighteen years."

Accurate assessment of jury verdicts is complicated by the fact that prior to this Court's decision in 1982 in Eddings v. Oklahoma, supra, some states unconstitutionally prevented the sentencer in a capital proceeding from giving meaningful consideration to the youth of the defendant as a mitigating factor. Nonetheless, jury verdicts in the present decade show an overwhelming trend against capital punish-

ment when the defendant was a minor. As of December, 1983, children under age eighteen constituted only 2.9 % of the death row population of 1,289 persons. Streib, The Eighth Amendment and Capital Punishment of Juveniles, 34 Cleve. St. L. Rev. 363, 384 (1986). Significantly, in the wake of Eddings, as the number of death sentences imposed upon adults has multiplied, the rate of death sentences for minors has decreased. From December 1983 to July 1986, the adult population of death row increased by 42 % (from 1,250 to 1,770), while the juvenile population decreased by 16 % (from thirty-eight to thirty-two); juveniles accounted for only 1 % of the approximately 700 death sentences imposed from December, 1983, to March, 1986. Id.

The consensus of modern values is also evident in the "'climate of international

opinion.'" Enmund v. Florida, supra, 458 U.S. 796 n.22. Three major international human rights treaties expressly prohibit the death penalty for children below the age of eighteen. See International Covenant on Civil and Political Rights, Article 6(5), in Multilateral Treaties Deposited With the Secretary General of the United Nations, at 124, U.N. Doc. ST/LEG/Ser. E/3 (1985); American Convention on Human Rights, Article 4(5), in Handbook of Existing Rules Pertaining to Human Rights in the Inter-American System, OEA/Ser. L/V/II, 65, Doc. 6, July 1, 1985, at 63; Geneva Convention for the Protection of Civilians in Time of War, Article 68. Over eighty nations, including the vast majority of western European countries, have either abolished the death penalty altogether or have forbidden it for children and adolescents.

Hartman, "Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty, 52 Cin. L. Rev. 655, 666 n.44 (1983). Even among the eighty-one nations that do permit executions of children, there were only two juveniles who were actually put to death during the decade from 1973-82. Id. at 666-67 n.44. Reports of the Secretary General of the United Nations confirm that "the great majority of Member States report never condemning to death persons under eighteen years of age." See United Nations Economic and Social Council (UNESCO), Report of the Secretary General on Capital Punishment at 10, UN. Doc. E/5242 (1973).

2. This Court's prior analyses of children's rights and disabilities also militate for treating children as a coherent class and drawing the line at age eighteen

This Court's decisions concerning the

legal rights and disabilities of minors repeatedly treat juveniles as a coherent class, without distinguishing between mature and immature minors. Significantly, in these cases, the Court did more than simply defer to legislative line-drawing. The Court in each case examined the justifications for drawing a line between childhood and adulthood, and upheld legislative actions because the Court itself concluded that minors' reduced capacity for mature decisionmaking provided a justification for treating them differently from adults.

In rejecting a challenge to the constitutionality of a statute authorizing preventive detention for juveniles, this Court in Schall v. Martin, 467 U.S. 253 (1984), employed a due process analysis that was based upon the Court's perception of the differences between childhood and adulthood.

The Court ruled that the right to liberty enjoyed by all adults is "qualified" (id. at 265) when applied to a juvenile, because "[c]hildren, by definition, are not assumed to have the capacity to take care of themselves." Id. Without distinguishing between mature and immature minors, or between differing age groups of minors, the Court broadly concluded that juveniles' immaturity and lack of judgment justify the State in employing preventive detention to protect "'the juvenile from his own folly.'" Id. at 265; see also id. at 266.

The Court similarly applied a class-wide assumption of immaturity in Parham v. J.R., 442 U.S. 584 (1979), to reject a due process challenge to a Georgia civil commitment statute that authorized third-party commitment of children under the age of eighteen. In curtailing children's liberty

interests in this context, the Court relied upon the generalization that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions." Id. at 603.

When the Court in Ginsberg v. New York, 390 U.S. 629 (1968), rejected a First Amendment challenge to a state statute prohibiting the sale of sexually explicit (albeit non-pornographic) material to minors, the Court's analysis rested upon its conclusion that the State can take steps to ensure that children "are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.'" Id. at 640-41. In a passage that has often been reiterated by this Court, Justice Stewart expressed the generalization that children are "not possessed of that full capacity for individual choice

which is the presupposition of First Amendment guarantees." Id. at 649-650 (Stewart, J., concurring) (footnotes omitted).

As the plurality observed in Thompson, "[i]t would be ironic if these assumptions that we so readily make about children as a class -- about their inherent difference from adults in their capacity as agents, as choosers, as shapers of their own lives -- were suddenly unavailable in determining whether it is cruel and unusual to treat children the same as adults for purposes of inflicting capital punishment." 108 S. Ct. at 2693 n.2. There can be no justification for employing a "ratchet" analysis that forbids case-by-case decisionmaking for the sake of expanding juvenile rights while employing that very same form of decision-making for the sake of extinguishing the

greatest of all rights, the right to life.[3]

3/ The decisions addressing a young woman's privacy right to an abortion constitute the only factual context in which this Court has tolerated any line-drawing on the basis of the relative maturity or immaturity of individual youths. See Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird, 443 U.S. 622 (1979); H.L. v. Matheson, 450 U.S. 398 (1981). However, the Court has permitted line-drawing only in order to avoid irrevocable harm to mature minors. This Court struck down certain types of burdens on pregnant minors because of the "grave and indelible" consequences to a minor if she is forced to have a child. See Bellotti v. Baird, supra, 443 U.S. at 642 ("considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor"). Thus, the Court ruled that the Constitution requires States to recognize a distinction between mature and immature minors only where the deprivation of certain rights and privileges would result in "grave and indelible consequences." The present cases certainly do not fall within this exception which the Court has carved in its general approach of treating all minors as a coherent class. Unlike the

The only principled line between children and adults in the context of capital punishment is the same line that this Court has repeatedly drawn in defining the rights of minors: the age of majority. For this reason, the Court should rule that children who were below the age of eighteen[4] at the

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abortion cases, there are no "grave or indelible" consequences to anyone -- not the State and certainly not the minor -- in preventing minors from being executed.

4/ Although the States vary somewhat in the age designated as the "age of majority", virtually all States employ age eighteen. See M. Guggenheim & A. Sussman, The Rights of Young People 187, 290-91 (2d ed. 1985) (listing the age of majority for every state). This includes Georgia. See Ga. Code Ann. § 39-1-1(a) (1982). Missouri has not established a uniform age of majority; although eighteen is designated as the age of majority for most matters (see, e.g., Mo. Ann. Stat. § 431.055 (Supp. 1988) (competency to contract); Mo. Ann. Stat. § 475.010(11) (Supp. 1988) (trusts and estates); Mo. Ann. Stat. § 507.115 (Supp. 1988) (for purposes of

time of the offense cannot be executed.

II.

ASSUMING ARGUENDO THAT THERE WERE A PRINCIPLED BASIS FOR DISTINGUISHING AMONG JUVENILES IN THE CAPITAL SENTENCING CONTEXT, THE MECHANISMS FOR DOING SO IN GEORGIA AND MISSOURI DO NOT PROVIDE A CONSTITUTIONALLY ACCEPTABLE BASIS FOR SUCH DECISIONMAKING

The plurality and the dissent in Thompson agreed that the key considerations in determining the suitability of execution for a young person are maturity and responsibility. As the following discussion will show, neither Georgia nor Missouri requires a determination of maturity or moral responsibility as a prerequisite for sentencing to death an individual whose offense was committed prior to age eighteen

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civil suits)), twenty-one is still the age of majority for some purposes (see, e.g., Mo. Ann. Stat. § 404.007(14) (Supp. 1988) (transfer of property to a minor).

or even prior to age sixteen. Indeed, neither State even provides the minimal protection suggested by the dissent in Thompson: "a rebuttable presumption that [the defendant] . . . is not mature and responsible enough to be punished as an adult." 108 S. Ct. at 2712.

A. Although the Georgia Statute Sets a Minimum Age for Death-Eligibility, It Fails to Provide Adequate Procedural Safeguards for Minors like Petitioner Jose High Who Are Above the Statutory Minimum Age

The Georgia statutory scheme, unlike the Oklahoma statute considered in Thompson, establishes a statutory minimum age, prohibiting capital punishment for a defendant who was under the age of seventeen at the time of the offense. See Ga. Code Ann. § 17-9-3 (1982).[5] Under Georgia law, all

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5/ Although the State of Georgia took the

seventeen-year-olds are eligible for capital punishment.

As Part I.B of this brief demonstrated, seventeen-year-olds share many of the qualities of adolescence that render capital punishment unjustifiable for younger children. The almost universal selection of age eighteen as the age of majority in this country attests to the widespread recognition that many seventeen-year-olds are unable to exercise adult judgment. That perception of the differences between

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position for several years that the actual minimum age of eligibility for capital punishment was thirteen, see, e.g., Lewis v. State, 246 Ga. 101, 107, 268 S.E.2d 915, 920-21 (1980) (Hill, J., concurring); Hawes v. State, 240 Ga. 327, 337-41, 240 S.E.2d 833, 840-42 (1977) (concurring opinions of Hall, J., and Hill, J.), the Georgia Supreme Court made clear in Bankston v. State, 258 Ga. 188, 367 S.E.2d 36 (1988), that Ga. Code Ann. § 17-9-3 establishes an absolute minimum-age of seventeen.

seventeen- and eighteen-year-olds also is reflected in the selection of age eighteen as the minimum age of eligibility for capital punishment in most of the states that have consciously set a minimum age of death-eligibility. Even the Georgia legislature has recognized that significant developmental differences distinguish seventeen-year-olds from the class of adults whose adulthood begins on their eighteenth birthday: Ga. Code Ann. § 17-10-14 (Supp. 1987) provides that youths transferred to adult court and convicted of a crime (including a capital crime) can be imprisoned only in a juvenile facility and that placement in an adult correctional facility cannot take place until the youth reaches the age of eighteen.[6]

6/ This statute provides:

"Notwithstanding any other provisions

Yet, for defendants who are seventeen

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of this article, in any case where a person under the age of 17 years is convicted of a felony and sentenced as an adult to life imprisonment or to a certain term of imprisonment, such person shall be committed to the Division of Youth Services of the Department of Human Resources to serve such sentence in a detention center of such division until such person is 18 years of age at which time such person shall be transferred to the Department of Corrections to serve the remainder of the sentence."

Ga. Code Ann. § 17-10-14 (Supp. 1987).

The conclusion that the Georgia legislature recognized the developmental distinction between the ages of seventeen and eighteen is not inconsistent with its enactment of a statute forbidding capital punishment for crimes committed before age seventeen. This minimum-age statute expresses the legislature's determination that no child under the age of seventeen can possibly be culpable enough to warrant imposition of the death penalty. It does not, however, preclude the conclusion that the developmental differences between ages seventeen and eighteen might result in some seventeen-year-olds being too immature to be eligible for the death penalty.

at the time of the offense, the only procedural protection afforded on account of the defendant's youth is the same procedural protection afforded young adults over the age of eighteen: consideration of the youth of the defendant as a mitigating factor. See, e.g., Lewis v. State, 246 Ga. 101, 104, 268 S.E.2d 915, 919 (1980). It is evident that such a system, which treats youth as simply one mitigating factor to be weighed against aggravating factors, does not provide for specific findings of the characteristics deemed important by every member of this Court in Thompson: maturity and culpability. That conclusion is demonstrated by Enmund v. Florida, 458 U.S. 782 (1982), where, notwithstanding Florida's providing for consideration of the defendant's minor participation in the crime as a statutory mitigating circumstance, see id. at 806

(O'Connor, J., dissenting), this Court created a rule requiring that "at some point in the process, the requisite factual finding as to the defendant's culpability . . . [be] made." Cabana v. Bullock, 474 U.S 376, 387 (1986).

In failing to provide any procedural safeguards such as a specific determination of culpability despite their youth or "a rebuttable presumption that [they] . . . are not mature and responsible enough to be punished as an adult," Thompson, supra, 108 S. Ct. at 2712 (Scalia, J., dissenting), the Georgia system insufficiently guards against execution of defendants who were immature, non-culpable seventeen-year-olds at the time of the offense. Even if this Court does not establish a categorical minimum-age of eighteen, the Court should rule at the very least that a statutory scheme such as this

violates the Eighth Amendment.

B. Missouri's Use of Transfer to Determine Death-Eligibility Suffers from the Same Flaws as the Oklahoma Scheme Considered in Thompson and Results in Irrational and Inconsistent Imposition of the Death Penalty

1. The Missouri Statute Suffers from the Same Defects that Led this Court to Strike Down the Death Sentence in Thompson v. Oklahoma

The Missouri statutory scheme for determining juveniles' eligibility for the death penalty suffers from precisely the same flaws as the Oklahoma statute considered by this Court in Thompson. In Missouri, as in Oklahoma, the death penalty statute fails to establish any minimum age. See Mo. Ann. Stat. §§ 565.020 & 565.030-565.040 (Supp. 1988). For children under the age of seventeen (the age limit for the jurisdiction of the juvenile court, Mo. Ann. Stat. § 211.021 (Supp. 1988)), eligibility for capital punishment is determined by the

process of transfer to adult court. Missouri law authorizes transfer of children "between the ages of fourteen and seventeen [who have] . . . committed an offense which would be considered a felony if committed by an adult." Mo. Stat. Ann. § 211.071(1) (Supp. 1988). Since the capital punishment statute specifies no minimum age, any child who is transferred to adult court for a capital offense is subject to the death penalty.

In Missouri, as in Oklahoma, there is no reason to believe that the state legislature "deliberately concluded that it would be appropriate to impose capital punishment" on the children subjected to transfer to adult court. Thompson, supra, 108 S. Ct. at 2707 (O'Connor, J., concurring). Because the legislature "proceeded in this manner, there is a considerable risk

that the . . . [Missouri] legislature either did not realize that its actions would have the effect of rendering [all transferred children] . . . death-eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death-eligibility." Id. at 2711 (O'Connor, J., concurring).

A review of Missouri caselaw on transfer to adult court amply supports the conclusion that "[t]here are many reasons, having nothing whatsoever to do with capital punishment, that might [have] motivate[d] . . . [the Missouri] legislature to provide as a general matter for some [16-year-olds] . . . to be channeled into the adult criminal process," such as a legislative judgment that "[t]he length or conditions of confinement available in the juvenile system . . .

[are] inappropriate for serious crimes or some recidivists." Id. at 2707 (O'Connor, J., concurring). See, e.g., State v. Tate, 637 S.W.2d 67, 71-72 (Mo. App. 1982) (fifteen-year-old one week short of his sixteenth birthday, charged with murder, transferred to adult court; in approving transfer, appellate court stresses that it was "reasonable for the juvenile court to conclude that from a practical standpoint only two years of rehabilitative confinement was available and that based upon the crime and defendant's past history such a period was not adequate to rehabilitate defendant and more important, to protect society from him"); State v. Owens, 582 S.W.2d 366, 371, 375 (Mo. App. 1979) (primary factor in justifying transfer of fifteen-year-old charged with rape was the restriction upon the length of confinement that could be

ordered through the juvenile justice system); State v. Kemper, 535 S.W.2d 241, 250-51 (Mo. App. 1976) (although fifteen-year-old charged with murder was a first offender who had been diagnosed as suffering from mental problems which could be treated in a secure wing of a State Hospital which included adults, transfer ordered because "there was no exclusively juvenile facility available to the court which would provide the treatment which might be required by the child and still afford the security which the court deemed essential in the handling of a youth such as appellant" and because the length of confinement through the juvenile justice system would not provide sufficient time for rehabilitation).

The only factor that prevents petitioner Heath Wilkins from benefitting from the rule this Court adopted in Thompson

is of course that petitioner is sixteen, and the facts of the Thompson case did not require this Court to consider the applicability of its holding to children over the age of fifteen. The evidence of a national consensus against execution of sixteen-year-olds is virtually as strong as the evidence considered by this Court in Thompson with respect to fifteen-year-olds, and certainly strong enough to justify the type of precaution adopted in Thompson. Fifteen of the eighteen states that have specified a minimum age for capital punishment prohibit execution of sixteen-year-olds.[7] Thus, only three state legislatures in this country

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7/ The only states that have established a minimum-age of sixteen are: Indiana (Ind. Code Ann. § 35-50-2-3 (Supp. 1987)); Kentucky (Ky. Rev. Stat. Ann. § 640.040(1) (1986)); and Nevada (Nev. Rev. Stat. § 176.025 (1987)).

have expressly and consciously chosen to classify persons who committed an offense while sixteen as eligible for the death penalty. Jury verdicts of death in cases in which the defendant was sixteen at the time of the crime appear to be almost as rare as verdicts of death for fifteen-year-olds. See Streib, supra, at 384-86. Finally, the social scientific evidence shows that sixteen-year-olds share with fifteen-year-olds and younger children the qualities of impulsivity, lack of judgment, and potential for change that render inapplicable the societal purposes for the death penalty. See Part I supra.

Accordingly, even if the Court does not create a categorical minimum-age limit of eighteen, as amici have urged in Part I of this brief, the Court should, at the very least, strike down petitioner Heath Wilkins'

death sentence on the ground that it was imposed "under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution." Thompson, supra, 108 S. Ct. at 2711 (O'Connor, J., concurring).

2. By Relying on Transfer as a Mechanism for Determining Eligibility for Capital Punishment, the Missouri Statute Results in "Freakish" and Unusual Application of the Death Penalty

There is a second and independent reason for finding that Missouri's statutory mechanism for determining eligibility for capital punishment violates the Eighth Amendment. The transfer system in Missouri is so unrelated to the necessary inquiry in capital punishment cases that its use as the determinant for death-eligibility results in freakish and unusual application of the death penalty.

The plurality, concurrence, and dissent in Thompson agreed that the critical consideration in determining juveniles' eligibility for capital punishment must be maturity. But Missouri transfer caselaw reveals that maturity is not the central determinant of which children are transferred to adult court and rendered eligible for capital punishment. See, e.g., State v. Mouser, 714 S.W.2d 851, 858 (Mo. App. 1986) (sixteen-year-old charged with capital murder transferred despite evidence of "immaturity and tendency to make decisions emotionally rather than intellectually" and despite lack of criminal history, because defendant was intellectually average and because the rehabilitative facilities available through the juvenile court were not "sufficiently secure and available").

As demonstrated in the previous

section, transfer in Missouri is frequently predicated on the need for a longer period of rehabilitation than could be provided through the juvenile justice system. But the need for longer rehabilitation (which necessarily encompasses an assessment that the individual is amenable to rehabilitation) not only fails to further the inquiry necessary for death-eligibility; it is directly inconsistent with the use of capital punishment.

Thus, Missouri's transfer system does not ask the questions necessary for rationally "'distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" Gregg v. Georgia, supra, 428 U.S. at 188 (quoting Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring)). The factors that render a child transferable and thus death-

eligible bear no connection whatsoever to the considerations that this Court has deemed relevant to capital punishment. In short, the use of transfer as a mechanism for defining the death-eligible population of children renders the death penalty "cruel and unusual in the same way that being struck by lightning is cruel and unusual." Furman v. Georgia, supra, 408 U.S. at 309 (Stewart, J., concurring).

CONCLUSION

Amici respectfully submit that a society bounded by an injunction not to inflict cruel and unusual punishment, as measured by evolving standards of decency, should recognize as a categorical rule of law that no person may be executed for an offense committed while under the age of eighteen years. Amici urge this Court to reverse the judgments of the Supreme Courts

of Georgia and Missouri insofar as they uphold the imposition of petitioners' sentences of death.

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